National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: November 30, 1995

TO: Roy H. Garner, Regional Director, Region 28

FROM: Barry J. Kearney, Acting Associate General Counsel, Division of Advice

SUBJECT: Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165, (Sahara Hotel and Casino), Case 28-CB-4349

530-6067-2070-6760, 554-1433-6725, 554-1450-0140, 554-1467-3084

This case was submitted for advice as to whether the Union violated Section 8(b)(3) by insisting to impasse on after-acquired clauses extending a contract to employees at all newly-acquired facilities, as well as provisions regulating the manner in which the Union will organize such employees.

facts

Sahara Hotel and Casino Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165 (Sahara Hotel and Casino), Case 28-CB-4349 ("Employer" or "Sahara"), located in Las Vegas, Nevada, has a long-term bargaining relationship with Respondent Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, Local 165 ("Union") covering a unit of hotel service employees. The most recent collective-bargaining agreement between the parties expired on June 1, 1994.[(1)] Eleven bargaining sessions since that date have failed to result in a contract.

Initially the Employer began bargaining as part of a multi-employer group consisting of approximately seven Las Vegas casino/hotels. However, after the seventh session on October 11 the Employer withdrew from the multi-employer group and continued negotiations with the Union on an individual basis.[(2)]

By letter to the Union dated October 20, the Employer accepted most of the Union's proposed contract terms, including a 25-cent per hour wage increase for each year of the three-year agreement as well as any increased health and welfare contributions to which the multi-employer group had agreed. However, the Employer indicated that it was opposed to the "neutrality clause." According to the Region, the neutrality clause encompasses both Section 28.01 and a "Memorandum of Agreement."[(3)] Section 28.01 provides that,

This Agreement shall cover all employees employed in classifications listed in Exhibit 1 in operations within the jurisdiction of the Union, in Greater Las Vegas, Nevada, which during the term of this Agreement, are owned by, or operated by or substantially under the control of the Employer .... However, the foregoing provisions of this Section shall not apply ... to any employees employed in non-hotel operations.[(4)]

The eighth paragraph of the Memorandum of Agreement would also extend the contract to new facilities. It provides that:

The Union may request recognition as the exclusive collective bargaining agent for the employees in the traditional bargaining unit represented by the Union in the hotel-casino industry in Las Vegas. A disinterested, neutral party mutually satisfactory to the Employer and the Union will be selected to conduct a review of employees [sic] authorization cards and membership information submitted by the Union in support of its claim to represent a majority of the employees in the unit. If a majority of employees within the unit has joined the Union or designated it as their exclusive collective bargaining representative, the Employer will recognize the Union as such representative of the employees and will extend to such employees this collective bargaining agreement between the Union and the Employer together with any amendments agreed to by the parties. The

Employer will not file a petition with the National Labor Relations Board for any election in connection with any demands for recognition provided for in this agreement.

The neutrality clause further obliges the Employer to take a "positive" approach to Union organizing efforts at any new operation the Employer may subsequently acquire. Thus, the Employer will comply with the following rules.

Employer Speech Clause

·"[The Employer] will advise such employees that it welcomes their selection of a collective bargaining agent. The Employer will not do any action nor make any statement that will directly or indirectly state or imply any opposition by the Employer to the selection by such employees of a collective bargaining agent, or preference for or opposition to any particular union as a bargaining agent."

Access Clause

·"If the Union provides written notice to the Employer of its intent to organize employees ... the Employer shall not interfere with access on its premises to such employees by the Union to the extent such access is permitted by the Employer's lawful solicitation rules."

Roster Clause

·"Within ten (10) days following receipt of such written notice of intent to organize employees ... the Employer will furnish the Union with a complete list of such employees, including both full and part-time employees ... showing their job classifications and departments. Within two (2) weeks thereafter, the Employer will furnish a second list of such employees to the Union, including the addresses of all employees unless an employee objects in writing to the disclosures of his or her name. Thereafter, the Employer will provide updated lists monthly."

At the next bargaining session held on October 24, agreement was reached on most of the Union's proposals. Nonetheless, Union negotiator John Wilhelm stated that the neutrality clause was the Union's most important issue. Also, the Union rejected the Employer's offer to abide by the multi-employer group's annual 25-cent wage increases, as well as any increases in contractual health and welfare contributions. Instead, Wilhelm insisted that the Employer either agree to the neutrality clause or accept a higher wage package consisting of hourly increases of 50 cents for the first year and 40 cents for each of the succeeding two years.

At the December 7 bargaining session the Employer offered to adopt economic terms which were identical to the Union's package with the multi-employer group, but it continued to reject the neutrality clause. Wilhelm reiterated that the neutrality clause was a key issue for the Union in the negotiations.

At the final December 14 bargaining session the Employer announced that it felt negotiations were at a stalemate and thus that they planned to implement the 25-cent wage increase with retroactive effect, as well as any subsequent increases in health and welfare contributions to which the multi-employer group agreed.[(5)] The Union did not respond to the Employer's assertion that negotiations were at a stalemate. Although the Union commended the Employer about its decision to implement the wage increase retroactively, it continued to express its strongly-held feelings about the neutrality clause.

According to the Union, several other Las Vegas properties agreed to the neutrality clause conditioned upon the adoption of the clause by all the other area employers. Thus, the Union believes that these properties will refuse to enforce the neutrality clause should the Sahara decline to agree to one. Similarly, at least four of the signatory employers negotiated a "most favored nations" clause which, according to the Union, would further give the signatory employers the right to ignore the neutrality clause should the Sahara reject a similar provision.

action

We conclude that the Union's insistence to impasse on the after-acquired clauses was not unlawful because they involve a

mandatory subject of bargaining. Nonetheless, complaint should issue, absent settlement, alleging that the Union unlawfully insisted to impasse on three permissive subjects of bargaining encompassed by the neutrality clause, i.e., requirements that the Employer refrain from making statements concerning Union organizing campaigns, that the Employer provide the Union with lists of non-unit employees' names and addresses, and that the Employer provide the Union with access onto its property in order to organize its employees. However, the Region should argue that the better view is that the last two proposals, i.e., those relating to the employee roster and access, when coupled with the after-acquired clauses, are mandatory subjects concerning the implementation of the after-acquired clauses and, therefore, that the Union's insistence on these two proposals was lawful.

In NLRB v. Wooster Division of Borg-Warner Corp.,[(6)] the Supreme Court held that a party may insist to impasse only with respect to mandatory subjects of bargaining and that insistence to impasse on a permissive subject violates the statutory duty to bargain in good faith. The Court agreed with the Board's reasoning that insistence to impasse on a permissive subject "is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining."[(7)]

The Supreme Court has defined a mandatory subject of bargaining as involving only those issues which settle an aspect of the relationship between the employer and its employees.[(8)] Although matters involving individuals outside the employment relationship do not generally fall within that definition, the Court recognized that they are not wholly excluded. The touchstone in such cases is "not whether the third-party concern is antagonistic to or compatible with the interests of bargaining-unit employees, but whether it vitally affects the 'terms and conditions' of their employment."[(9)]

1. The After-Acquired Clauses

In Houston Division of the Kroger Company (Kroger II),[(10)] the Board concluded that the employer violated Section 8(a)(5) by refusing to recognize two unions pursuant to a contractual after-acquired clause. The clause at issue provided that the unions shall be the exclusive bargaining representatives "for all employees employed by the Houston Division of Kroger Food Stores ... that are, or will be owned, leased, or operated by the Employer."[(11)] After Kroger administratively transferred two stores from its Dallas to its Houston Division, the employer declined the unions' offer to submit card majorities and refused to recognize them at the two locations.

In Kroger II, the Board revisited this issue upon remand from the D.C. Circuit. In the initial Kroger I case the Board had dismissed the charges, holding that the after-acquired clause did not waive the employer's right to file an election petition because the clause did not explicitly set forth a legally permissible means (such as a card check) of resolving the issue of majority status. The D.C. Circuit reversed. It held that the only interpretation which would save the after-acquired clause from meaninglessness is that it necessarily encompassed a waiver of the employer's right to a Board-conducted election.[(12)] Upon remand from the D.C. Circuit the Board agreed. Accordingly, because the unions had card majorities at the new facilities, the Kroger Board held that the employer unlawfully refused to honor its contractual commitment to recognize the unions.

In United Mine Workers of America (Lone Star Steel),[(13)] the Board found that an "application of contract" clause which would apply the existing collective-bargaining agreement to other, separate bargaining units at subsequently acquired employer-owned or operated coal production or preparation facilities was governed by Kroger even though Kroger's after-acquired clause added the employees in new operations to the existing unit. The Board at p. 576 noted that the Kroger-type after-acquired clause constituted a mandatory subject of bargaining since the Board, in Kroger, found that the employer violated Section 8(a)(5) by breaching the after-acquired clause. In so finding, the Board in Lone Star noted: as the Supreme Court stated in Pittsburgh Plate Glass, supra, the Act does not require continued adherence to permissive as well as mandatory terms: "the remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract ... not in an unfair labor practice proceeding."[(14)]

We initially conclude that the two after-acquired clauses in this case are Kroger-type clauses rather than Lone Star application of contract clauses since, like the employees who were the subject of the clause in Kroger, newly-organized employees at a new facility will be absorbed into the existing bargaining unit.[(15)] Also, the two after-acquired clauses here clearly do not contemplate the extension of the contract to other operations or employees other than the type of employee covered by the current unit, as the 10th Circuit found that the Lone Star application of contract clause intended. Section 28.01 states that the

"Agreement shall cover all employees employed in classifications ... which during the term of this Agreement, are owned by, or operated by or substantially under the control of the Employer" but will not apply to "any employees employed in non-hotel operations." The Memorandum of Agreement further provides that the Employer will "extend" the contract to new employees who will be "in the traditional bargaining unit represented by the Union in the hotel-casino industry in Las Vegas." The contractual Recognition Clause, Section 1.01, further provides that "all employees working in classifications listed in Exhibit 1 are properly within the bargaining unit," with the exception of those employees working at "any subsequently acquired property not organized by the Union ...." (16) Thus, it appears that after the Union successfully establishes a card majority at a new facility, the new employees will be brought within the existing bargaining unit and the existing collective-bargaining agreement will be extended to them. (17) Accordingly, the instant after-acquired clauses constitute mandatory subjects of bargaining. (18)

We further conclude that the instant after-acquired clauses are mandatory under a second theory, specifically that the clauses are so intertwined with the terms and conditions of unit members' employment as to take on their mandatory nature. In Sea Bay Manor Home, (19) the Board held that the employer violated Section 8(a)(5) and (1) of the Act by refusing to abide by a stipulation agreement to submit the contractual terms under negotiation to interest arbitration. After considerable bargaining over mandatory subjects, the parties voluntarily agreed to resolve their current differences by interest arbitration. Under the particular circumstances presented, the Board held that the stipulation agreement to submit to interest arbitration was tantamount to a collective-bargaining agreement between the parties. The agreement to arbitrate "was so intertwined with and inseparable from the mandatory terms and conditions for the contract currently being negotiated as to take on the characteristics of the mandatory subjects themselves." (20) Similarly, in Columbia University, (21) the Board considered an agreement made by the parties during negotiations to submit to interest arbitration the issue of wages for a single classification of employees, part of the contract under negotiation. In that case, the Board held that "[b]ecause wages are undeniably a mandatory subject of bargaining, the interest arbitration agreement here, serving as a substitute for further negotiations over wages, has taken on the characteristics of that mandatory subject." (22)

Like the interest arbitration agreements in Sea Bay Manor Home and Columbia University, the after-acquired clauses serve as a mechanism to determine terms and conditions of employment. Thus, when the Union establishes a card majority at a new facility, the after-acquired clauses effectively resolve all mandatory subjects of bargaining by absorbing new employees into the existing bargaining unit and applying the contract to them. The after-acquired clauses, then, serve as substitutes for collective bargaining which similarly settle all of the new employees' terms and conditions of employment. In these circumstances, we conclude that the after-acquired clauses -- exhibiting "a vital and immediate impact on the employees by establishing their current terms and conditions of employment" (23) -- are so inextricably intertwined with mandatory subjects of bargaining as to take on their characteristics. (24)

2. Other Aspects of the Neutrality Clause

The neutrality clause includes provisions which aid the Union in organizing unrepresented employees. The questions of whether each of these provisions can be deemed permissive or mandatory (and thus whether the Union may lawfully insist to impasse on them) are of first impression. We conclude that the employer speech provision is permissive. As to the roster and access provisions, while we believe that the better argument, as explained below, is that these provisions are mandatory, and therefore, that the Union may lawfully insist to impasse on the provisions, the Region should issue complaint as to these two provisions so the Board may address these novel questions.

a. The Employer Speech Clause

We conclude that the Union may not lawfully insist to impasse on that portion of the neutrality clause that requires the Employer to waive its Section 8(c) right to voice an opinion about the Union's organizing campaign.

The Board has held in a wide variety of situations that a proposal which would waive another party's statutory rights constitutes a permissive subject of bargaining. In Reichhold Chemicals, Inc., (25) the Board concluded that the employer unlawfully insisted to impasse on a waiver of the union's right to file Board charges alleging that the employees engaged in an

unfair labor practice strike. Citing the "overriding public interest" in "unimpeded access to the Board,"[(26)] the Board held that the waiver could have an improper chilling effect and thus deter employees from filing charges alleging that discipline imposed pursuant to a no-strike clause was discriminatory in nature.[(27)] The Board has similarly held that an "election-of-remedy" proposal which would require a party to process a dispute through a single forum -- either through a Board charge or contractual arbitration -- constitutes a permissive subject of bargaining because it impermissibly waives the statutory right to file charges with the Board.[(28)] Similarly, a party may not condition the reaching of a collective-bargaining agreement on the withdrawal of Board charges or the settlement of backpay liability.[(29)]

The Board has also held that a union violated Section 8(b)(3) by insisting to impasse on an interest arbitration clause which would waive the employer's Section 8(b)(1)(B) right to choose its own collective-bargaining representative.[(30)] Similarly, a union unlawfully insisted to impasse on the employer's adoption of an industry promotion program, a permissive subject of bargaining which would effectively compel the employer to designate an employer association as its bargaining representative.[(31)] The Board has further held that respondents unlawfully insisted to impasse on permissive subjects which would waive unions' statutory rights to select union stewards[(32)] and members of the union grievance and bargaining committee,[(33)] and the employer's statutory right to select appointees to an arbitration panel.[(34)]

We conclude herein that the Employer Speech clause constitutes a permissive subject of bargaining. Under Section 8(c), an employer enjoys a statutory "free speech right to communicate his views to his employees [which] is firmly established and cannot be infringed upon by a union or the Board."[(35)] The clause here clearly would deprive the Employer of its right under Section 8(c) to voice non-coercive, lawful opinions to non-unit, unrepresented employees about the benefits or drawbacks of Union representation. In a variety of situations, supra, the Board has refused to imbue one party with the authority to insist to impasse on a waiver of its opponent's statutory rights. The Supreme Court, in fact, has admonished that waivers of this sort are not to be lightly inferred.[(36)] Thus, while the Employer may lawfully agree to curtail its Section 8(c) free speech rights, the Union may not insist to impasse on their abandonment.

b. The Roster and Access Clauses

We apply a somewhat different analysis to the roster and access provisions.

Under current Board law, these provisions are arguably permissive. An employer is normally under no statutory obligation to provide a union with a list of non-unit employees' names and addresses for organizational purposes absent a pending election petition[(37)] or an obligation to remedy its egregious unfair labor practices.[(38)] Further, under the "general rule" enunciated by the Supreme Court in Lechmere, an employer is permitted to bar a nonemployee union organizer from access to its property unless the union carries its "heavy" burden of proof that no other reasonable means of communication with the employees exist.[(39)]

The proposals can also be regarded as permissive because they relate to the Union's internal union interests. The Board has held that internal union matters do not encompass mandatory subjects of bargaining.[(40)] In Borg-Warner, the Supreme Court held that a provision which would dictate the manner by which union members ratify collective-bargaining agreements and call strikes is a permissive subject. Thus, the Court emphasized that the "ballot" provision "settles no term or condition of employment," but rather "deals only with the relations between the employees and their unions."[(41)] The roster and access clauses similarly serve the Union's institutional interests by facilitating the organization of new, unrepresented members.[(42)]

Therefore, under the above analysis, the clauses are arguably non-mandatory. Consequently, the Region should issue complaint as to the roster and access clauses on this basis.

Nonetheless, the Region should argue that the preferred conclusion is that the roster and access proposals are mandatory because they are merely proposals for methods of implementing the Kroger clause, which is a mandatory subject. These provisions merely describe the mechanisms that the Union has asked the Employer to agree to as a way of implementing the Kroger clause. Thus, since the Union may lawfully insist to impasse on the Kroger clause, the Union and the Employer may

bargain about, and the Union may lawfully insist to impasse on the procedure to be used -- providing names and addresses of unit employees and access to the facility where the employees are located -- to facilitate the ultimate implementation of the Kroger clause. Thus, the roster and access provisions bear the same relationship to the Kroger clause that a trustee designation proposal bore to a multiemployer benefit plan in Sheet Metal Workers International Association.(43) There, after finding that the benefit plan was a mandatory subject, the Board concluded that the trustee designation proposal was similarly mandatory, and the union was privileged to bargain to impasse over the proposal, because the trustee proposal was "nothing more than the mechanism by which the composition of the board of trustees" was limited to "a reasonable number."(44) The Board further found that because the trustee designation clause would vitally affect the manner in which trust fund benefits would be distributed, there was "a substantial nexus" between that proposal and terms and conditions of employment.(45)

As noted above, it could be argued that the roster and access provisions are permissive because they are merely intended to help the Union organize the employees. However, the same can be said of the Kroger clause itself, since it permits the Union to tell employees, in the course of an organizing campaign, that as soon as the Union has achieved majority status, the employees will share in the already determined benefits of the existing collective-bargaining agreement and will not, unlike most employees in a newly organized facility, have to await the completion of initial contract negotiations to obtain new terms and conditions of employment. Since Kroger clauses are deemed mandatory even though it could be similarly argued that they facilitate union organizing, the argument that the roster and access provisions are permissive because they aid union organizing must also fail.

Finally, the fact that the access proposal calls for the Employer to waive its right under Lechmere to exclude nonemployee union organizers from its facility does not make the clause permissive. As noted above, a Kroger clause constitutes a waiver of an employer's right to demand a union victory in a Board election before recognizing and bargaining with the union. Since this waiver of an employer's statutory right is deemed mandatory, the access proposal cannot be deemed permissive merely because it calls for a waiver of the Employer's Lechmere right.

For all of these reasons, we conclude that the Region should argue that the roster and access provisions should be deemed mandatory, and the Union's insistence on these proposals found lawful. Such a conclusion would be analytically consistent with the Board's treatment of after-acquired clauses such as the one in question in this case.

3. Insistence to Impasse

Finally, we conclude that the Union insisted to impasse on the neutrality clause rather than merely offering the clause as one option to higher wages.(46) In Southern California Pipe Trades (Aero Plumbing Co.),(47) the respondent union submitted a standard collective-bargaining agreement negotiated by a multi-employer association to the charging party employer for signature. The employer agreed to most of the proposed contract but rejected certain permissive subjects. The union then modified its contract offer in lieu of agreement on these permissive subjects by demanding certain concessions from the employer, including a 50-cent per hour wage increase and 10 percent higher fringe benefits than those contained in the standard, multi-employer contract. The union explained that it cost the union money to bargain separately with the employer and thus that the employer would have to pay for it through increased wages and benefits. The employer responded that it would agree to the standard contract's wage and benefit package, but it rejected the additional costs.

The Board adopted the ALJD which held that the union unlawfully bargained to impasse over permissive subjects. In so concluding, the ALJ rejected the union's contention that it merely went to impasse over wages and benefits which constitute mandatory subjects of bargaining. Rather, the ALJ concluded that the union's "extreme" counterproposals indicated that the union in actuality had "no intention of deviating" from the standard agreement, and thus that the wage and benefit demands were "illusory."(48)

We similarly conclude that the evidence establishes that the Union herein had no intention of deviating from pattern bargaining in general and the industry-wide neutrality clause in particular. The Union acknowledges that the neutrality clause was the single most important subject of bargaining. In fact, several other employers expressly conditioned effectuation of neutrality clauses in their agreements on the unanimous acceptance of neutrality clauses in contracts with all the Las Vegas employers, including the Charging Party. Moreover, contracts with at least four employers include a most favored nations clause which

similarly ties the enforcement of neutrality clauses in their agreements to the Sahara's adoption of a similar provision. Thus, according to the Union, all of these employers might lawfully refuse to enforce their own neutrality clauses should the Union allow the instant Employer to reject such a clause. We conclude that the Union's concern for the industry-wide pattern of neutrality clauses drove its subsequent demand that the instant Employer adopt substantially higher wage increases than the other Las Vegas employer agreed to pay -- wage increases between 60 percent and 100 percent higher than the standard agreement in each of the three years of the agreement. Moreover, the Union evidently appeared content with the Employer's adoption of the standard agreement's wage and benefit package; it commended the Employer for agreeing to implement retroactively the 25-cent wage increases rather than the Union's subsequent higher demands. Thus, we conclude that the neutrality clause was the real cause of the subsequent impasse, despite the Union's illusory offer that the Employer choose between the neutrality clause and drastically higher labor costs.[(49)]

For the above reasons, we conclude that complaint should issue, absent settlement, alleging that the Union unlawfully insisted to impasse on three permissive subjects of bargaining, i.e., requirements that the Employer refrain from making statements concerning Union organizing campaigns, that the Employer provide the Union with lists of non-unit employees' names and addresses, and that the Employer provide the Union with access onto its property in order to organize its employees. However, in litigating the case, the Region should argue that the last two subjects are mandatory and, thus, that the preferred conclusion in this case is that the Union's insistence on such subjects was lawful.

B.J.K.

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[1] All dates hereafter are in 1994 unless specified otherwise.

[2] More specifically, the Sahara bargained jointly with a commonly-owned property, the Hacienda, after withdrawing from the multi-employer group.

[3] The neutrality clause remained unchanged from that contained in the prior agreement.

[4] Under the contractual Recognition Clause, Section 1.01, the Employer recognizes the Union as the exclusive collective-bargaining representative of employees employed at the Sahara Hotel, but excluding employees at "any subsequently acquired property not organized by the Union ...." Furthermore, "[t]he Employer and the Union agree that all employees working in classifications listed in Exhibit 1 are properly within the bargaining unit."

[5] The only remaining issues pertaining to the Sahara were wages and the neutrality clause. A subcontracting issue also remained open regarding the Hacienda Hotel; the parties had agreed to subcontracting language at the Sahara.

[6] 356 U.S. 342, 349 (1958).

[7] Ibid.

[8] Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division, 404 U.S. 157 (1971).

[9] Id. at 179 (emphasis supplied).

[10] 219 NLRB 388 (1975).

[11] Houston Division of the Kroger Company (Kroger I), 208 NLRB 928 (1974), rev'd and rem. sub nom. Retail Clerks International Association Local No. 455 v. NLRB, 510 F.2d 802 (D.C. Cir. 1975).

[12] Retail Clerks, 510 F.2d at 805-06. The court approvingly quoted from the dissent in Kroger I where Members Fanning and Jenkins opined that, "If the majority's interpretation of these clauses means that the employer can voluntarily recognize the Union or demand an election, then such an interpretation renders these clauses totally meaningless and without effect, for the Unions need no contract authorization to establish their representation status in a Board-ordered election." Id. at 805 n.14, quoting Kroger I, 208 NLRB at 931.

[13] 231 NLRB 573 (1977), enf. den. in pert. part sub nom. Lone Star Steel Co. v. NLRB, 639 F.2d 545 (10th Cir. 1980), cert. den. 450 U.S. 911 (1981). In United Mine Workers of America (Lone Star Steel Company), 262 NLRB 368 (1982), the Board accepted the court's remand as law of the case and held that the application of contract clause was a nonmandatory subject upon which the union unlawfully insisted to impasse.

[14] Ibid., quoting Pittsburgh Plate Glass, 404 U.S. at 188. The Board further concluded that the application of contract clause, which would extend the contract to employees who would remain outside the existing unit, constituted a mandatory subject inasmuch as it "vitally affects" unit employees' terms and conditions of employment "by removing incentives which might otherwise encourage Lone Star to transfer such work to other mines under its control." Lone Star, 231 NLRB at 574. The 10th Circuit denied enforcement in this regard. It held that the application of contract clause was overly broad because it could apply to new operations other than mines and thus was not a "direct frontal attack" upon a threat to employees' terms and conditions of employment. Lone Star Steel, 639 F.2d at 558.

[15] The contractual after-acquired clauses are specifically set forth in Section 28.01 and the first paragraph on page 2 of the Memorandum of Agreement, quoted, supra, at pp. 2-3.

[16] Emphasis supplied.

[17] The instant after-acquired clause is analogous to the clause at issue in S.B. Rest of Framingham, 221 NLRB 506 (1975), which similarly described the bargaining unit as encompassing employees in "all of the Employer's establishments .. as to which the Union has been certified ... or as to which the Union has presented to the Employer signed authorization or membership cards authorizing the Union to represent the majority of the employees each [sic] establishment ...." There, the Board held that this after-acquired clause envisioned a single national bargaining unit. Id. at 507. Also, there is no indication in this case that the operations to which the contract would apply would not appropriately be part of the current unit, as was apparently the situation in Lone Star.

[18] The Board in Kroger, in finding a Section 8(a)(5) violation as to the employer's refusal to apply the contractual after-acquired clause, necessarily found that clause to be a mandatory subject of bargaining. Thus, under Pittsburgh Plate Glass, supra, an employer at any time, even during the contract term, can refuse to comply with a permissive term of the contract without violating the Act. Consequently, finding that an employer violated the Act by refusing to apply a contract term constitutes a finding that the term is mandatory.

[19] 253 NLRB 739 (1980), enf'd mem. 685 F.2d 425 (2d Cir. 1982).

[20] Id. at 740.

[21] 298 NLRB 941 (1990).

[22] Id. at 941.

[23] Sea Bay Manor Home, 253 NLRB at 741.

[24] Interest arbitration constitutes a permissive subject where it seeks to resolve future contract disputes, a result which is too speculative to "vitally affect" current employees' terms and conditions of employment. See, e.g., George Koch & Sons, 306 NLRB 834, 839 (1992). However, like the mandatory interest arbitration agreements in Sea Bay Manor Home and Columbia University, the instant after-acquired clause has "an immediate and significant effect" on the terms and conditions under which newly-organized employees will work directly after the Union establishes a card majority. Sea Bay Manor Home, 253 NLRB at 740.

[25] 288 NLRB 69, 71-72 (1988), enf'd in pert. part sub nom. Teamsters Local 515 v. NLRB, 906 F.2d 719 (D.C. Cir. 1990), cert. den. 498 U.S. 1053 (1991).

[26] Id. at 71-72, quoting NLRB v. Industrial Union of Marine and Shipbuilding Workers, 391 U.S. 418, 424 (1968).

[27] See also Newberry Equipment Company, Inc., 157 NLRB 1527, 1534 (1966), enf. den. 401 F.2d 604 (8th Cir. 1968) (proposal deemed permissive where it waived right to file charges with the Board concerning the impact of a strike or lockout on employees); American Cyanimid Co. v. NLRB, 592 F.2d 356, 363-64 (7th Cir. 1979) (employer unlawfully insisted to impasse on union's waiver of right to file Board charges to seek redress for terminations during unfair labor practice strike); Matlock Truck Body Corp. v. NLRB, 94 LRRM 2456, 2462 (6th Cir. 1976) (in action for contempt, court held employer's insistence on prohibition of right to file ULP charge was "impermissible restraint").

[28] Athey Products Corp., 303 NLRB 92, 96 (1991); Josten Concrete Products Co., 295 NLRB 1029, 1031-32 (1989).

[29] Magic Chef, 288 NLRB 2 (1988); Laredo Packing Company, 254 NLRB 1, 18-19 (1981); Stackpole Components Company, 232 NLRB 723, 732 (1977). See also Plattdeutsche Park Restaurant, 296 NLRB 133, 137 (1989) (employer unlawfully insisted to impasse on union's withdrawal of state court lawsuit).

[30] Sheet Metal Workers Local 20 (George Koch Sons), 306 NLRB 834, 839 (1992); Sheet Metal Workers Local 59, 227 NLRB 520 (1976).

[31] Metropolitan District Council of Philadelphia (McCloskey and Company), 137 NLRB 1583, 1584 (1962). See also Sheet Metal Workers Local 38 (Elmsford Sheet Metal Works), 231 NLRB 699, 700-01 (1977), enf'd 575 F.2d 394 (2d Cir. 1978).

[32] Oates Bros., Inc., 135 NLRB 1295, 1297 (1962).

[33] American Vitrified Products Company, 127 NLRB 701, 716-19 (1960).

[34] Plumbing and Pipefitters Local 525 (Federated Employers of Nevada, Inc.), 135 NLRB 462, 470-71 (1962).

[35] NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969). See also Somerset Welding & Steel, 314 NLRB 829, 832 n.9 (1994) ("Sec. 8(c) protects an employer's right to address the issue of representation, provided that its views are devoid of threat of reprisal or promise of benefit.")

[36] Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983).

[37] See generally Excelsior Underwear, Inc., 156 NLRB 1236 (1966).

[38] See, e.g., Haddon House Food Products, Inc., 242 NLRB 1057, 1059 (1979), enf'd in pert. part 640 F.2d 392 (D.C. Cir. 1981), cert. den. 454 U.S. 827 (1981).

[39] Lechmere, Inc. v. NLRB, 502 U.S. 527, 535 (1992), quoting Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 205 (1978). Of course, there is no way to determine at this time whether the Union will enjoy a Lechmere right of access to the Employer's newly-acquired property. It is impossible to determine whether the Union will have other, reasonable means of communication with employees who have not been hired to work at a facility which has not yet been acquired.

[40] See, e.g., Mid-State Ready Mix, 307 NLRB 809 (1992) (demand that union steward be jointly selected by parties, non-mandatory); NLRB v. Superior Fireproof Door & Sash Co., 289 F.2d 713 (2d Cir. 1961) (requirement that union provide employees transferring out of the unit with withdrawal cards, non-mandatory); NLRB v. Corsicana Cotton Mills, 178 F.2d 344 (5th Cir. 1949) (demand that nonunion employees be allowed to vote at union meetings, non-mandatory).

[41] Borg-Warner, 356 U.S. at 350.

[42] The neutrality clause gives the Union the right to enter the Employer's property only to "the extent such access is permitted by the Employer's lawful solicitation rules." Under certain circumstances, similarly worded savings language may serve to render facially illegal contractual provisions lawful. Cf. Joint Council of Teamsters No. 42 (Associated Owner-Operators, Inc.), 248 NLRB 808, 816 n.28 (1980) (vague and general savings clause does not purge hot cargo provision of its illegality). However, this provision clearly does not turn a permissive subject of bargaining, i.e., one which serves the Union's institutional interests, into a mandatory subject which resolves employees' terms and conditions of employment.

[43] 234 NLRB 1238, 1243-45 (1978), enfd. sub nom. Central Florida Sheet Metal Contractors Association v. NLRB, 664 F.2d 489 (5th Cir. 1981).

[44] 234 NLRB at 1244.

[45] Ibid. Compare Borden, Inc., 279 NLRB 396, 399 (1986) (general release provision is non-mandatory subject because it lacks required interdependence with mandatory severance pay provision).

[46] The Regional Director concluded that the parties currently are at impasse and, thus, did not submit this issue for advice.

[47] 167 NLRB 1004 (1967), enf'd 449 F.2d 668 (9th Cir. 1971).

[48] Id. at 1009.

[49] The Board decisions in Nordstrom, Inc., 229 NLRB 601 (1977), and Good GMC, Inc., 267 NLRB 583 (1983), are factually distinguishable. In those cases, the Board held that a party may lawfully insist to impasse on a combination of mandatory and permissive subjects, so long as they were offered together as a package. In Nordstrom, however, the Board explicitly acknowledged that circumstances may exist where a party unlawfully insists to impasse on a permissive subject at a time when all other issues have been resolved. Nordstrom, 229 NLRB at 602, citing Aero Plumbing, supra. We conclude herein that insofar as the Union demanded the heightened wage increases only after the Employer rejected the neutrality clause rather than packaging the two together, the instant matter is more analogous to the facts in Aero Plumbing than the mandatory/permissive contract packages in Nordstrom and Good GMC.